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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

JEFFREY W. TAM, ) No. 07-2747 SI  
Plaintiff, )  
v. ) **DEFENDANT'S AMENDED REPLY  
IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**  
JOHN E. POTTER, Postmaster General, ) Date: June 27, 2008  
Defendant. ) Time: 9:00 a.m.  
 ) Place: Courtroom 10, 19th Fl.

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1       **I. INTRODUCTION**

2           Defendant's amended reply incorporates citations to the Second Supplemental  
 3 Declaration of Jennifer S Wang ("2d Supp. Wang Decl.") and Declaration of Shirley Morris  
 4 ("Morris Decl.") in footnote 3; no other substantive changes have been made. Plaintiff alleges  
 5 four claims: (1) discrimination; (2) hostile work environment; (3) retaliation; and (4) breach of  
 6 the collective bargaining agreement ("Agreement") between the American Postal Worker's  
 7 Union, AFL-CIO ("APWU") and the United States Postal Service ("USPS").<sup>1</sup> Defendant has  
 8 shown that plaintiff's hostile work environment claim, and, to the extent it is based on failure to  
 9 receive a promotion, plaintiff's discrimination claim are barred because plaintiff failed to timely  
 10 exhaust his administrative remedies.

11           Moreover, plaintiffs' discrimination, hostile work environment and retaliation claims  
 12 fail on the merits. Plaintiff bases his discrimination claim on the following: defendant's failure  
 13 to promote him to supervisor of transportation, delay in reassigning plaintiff to a driving  
 14 position, refusal to change plaintiff's work schedule in 2005, denial of his request for annual  
 15 leave from February 9-11, 2005, failure to call plaintiff to work overtime on February 12, 2005,  
 16 and alleged attempt to verbally intimidate plaintiff. Plaintiff has failed to rebut defendant's  
 17 legitimate, non-discriminatory reasons for failing to promote him: he was not the best qualified  
 18 applicant. Plaintiff has also failed to rebut defendant's legitimate, non-discriminatory reasons  
 19 for denying his leave request: plaintiff failed to provide adequate notice and no one was  
 20 available to cover plaintiff's shift. Plaintiff has failed to establish that delay in reassigning  
 21 plaintiff, refusal to change plaintiff's work schedule, failure to call plaintiff to work overtime

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23

24           <sup>1</sup> Defendant timely filed his motion for summary judgment on May 23, 2008. Pursuant to the  
 25 Court's September 10, 2007 Pretrial Preparation Order, plaintiff's Opposition to defendant's motion was  
 26 due on June 6, 2008. Plaintiff did not serve his Opposition on defendant's counsel on June 12, 2008, one  
 27 day before defendant's deadline for filing his Reply. Plaintiff does not yet appear to have filed his  
 28 opposition brief with the Court. *See Howell v. Swedish Medical Center*, No. C04-1329RSM, 2005 WL  
 2455020, at \*1 (W.D. Wash. Oct. 4, 2005) (holding that because the plaintiff's late-filed declaration with  
 attached exhibits were never actually filed, they could not be considered by the Court in ruling on the  
 defendant's summary judgment motion). Accordingly, defendant respectfully requests that the Court  
 strike plaintiff's Opposition.

1 on February 12, 0025, and alleged attempt to intimidate plaintiff constitute adverse employment  
2 actions, and has failed to show that any similarly situated employees were treated more  
3 favorably than plaintiff.

4 Defendant has shown that the harassing conduct plaintiff complains of does not, as a  
5 matter of law, suffice to establish conduct severe and pervasive enough to create an objectively  
6 hostile work environment, as well as the absence of any evidence of a causal nexus between the  
7 harassing conduct plaintiff complains of and his race or national origin. Defendant has also  
8 shown that the plaintiff's retaliation claim fails because defendant had a legitimate, non-  
9 retaliatory reason for restructuring the 2005 bulk mail assistant schedule. Finally, defendant has  
10 shown that plaintiff cannot maintain a cause of action in federal court to challenge alleged  
11 violations of the Agreement.

12 As the party opposing summary judgment, plaintiff's burden was to identify with  
13 "reasonably particularity" any evidence of a genuine, material, triable issue of fact on his  
14 claims. On summary judgment, once the moving party demonstrates the absence of a genuine  
15 issue of material fact, the non-moving party must go beyond the pleadings and by its own  
16 evidence set forth specific facts showing that there is a genuine issue for trial. *See Fed. R. Civ.*  
17 P. 56(e). The non-moving party must "identify with reasonable particularity the evidence that  
18 precludes summary judgment." *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir. 1996). Here,  
19 plaintiff's opposition consists of unsupported conclusory allegations, inadmissible hearsay  
20 evidence and speculation, and thus fails to supply the Court with any competent evidence of a  
21 material disputed issue of fact.

## 23 II. ARGUMENT

### 24 A. Plaintiff's Claim of Failure to Promote Fails

#### 25 1. Plaintiff's Claim Is Untimely

26 Plaintiff does not dispute that his discrimination claim based on defendant's failure to  
27 select him for transportation supervisor vacancies in 1999 to 2003 is untimely. "Each incident  
28 of discrimination and each retaliatory adverse employment decision constitutes a separate

1 actionable unlawful employment practice,” that must be separately exhausted before the EEOC.  
 2 *Nat'l Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002). Pursuant to 29 C.F.R. §  
 3 1614.105(a)(1), a plaintiff must contact an EEO Counselor within 45 days of an alleged  
 4 discriminatory act, or the effective date of an alleged discriminatory personnel action. The  
 5 alleged discriminatory acts plaintiff complains of occurred between 1999 and 2003. Plaintiff  
 6 has admitted that she did not contact an EEO Counselor until October 26, 2004, after the 45 day  
 7 limitations period had passed for each of these alleged discriminatory decisions. (Declaration  
 8 of Jennifer Wang In Support of Defendant's Motion for Summary Judgment (“Wang Decl.”)  
 9 Ex. A (Tam Dep.) 53:11-15, 59:6-8, 75:7-11 81:20-21,87:13-88:7 internal Ex. 11).

10                   **2. Plaintiff Cannot Rebut Defendant's Legitimate Reasons for His Actions  
 11 as Pretextual**

12                 Plaintiff has offered no evidence suggesting that defendant's legitimate reason for  
 13 failing to promote plaintiff to supervisor of transportation is pretextual. Once an employer  
 14 offers a nondiscriminatory reason for its actions, “the burden returns to the plaintiff to show  
 15 that the articulated reason is a pretext for discrimination.” *Leong v. Potter*, 347 F.3d 1117,  
 16 1124 (9th Cir. 2003). To rebut that presumption, the plaintiff must produce “specific and  
 17 substantial” evidence that the employer’s reasons are a pretext for discrimination. *Aragon v.  
 18 Republic Silver State Disposal, Inc.*, 292 F.3d 654, 658-59 (9th Cir. 2002).

19                 Here, defendant selected other candidates for available supervisor of transportation  
 20 positions for a legitimate reason: others were better qualified than plaintiff – a reason that had  
 21 nothing to do with plaintiff’s race or national origin. Plaintiff argues that defendant’s reasons  
 22 are pretextual because, two African-American applicants – “Mr. Bussby” and Barbara Thomson  
 23 – and a Hispanic applicant, Gloria Benavides, were selected for transportation supervisor  
 24 vacancies for which plaintiff also applied.<sup>2</sup> That those selected for the position were African-  
 25 American and Hispanic does not suffice to establish a discriminatory motive. *See Pottenger v.*  
 26

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28                 <sup>2</sup> Plaintiff states that Benavides became a transportation supervisor in 2002, but does not indicate  
 then Bussby or Thomson received became transportation supervisors. (Opp. at 3).

1       Potlatch Corp., 329 F.3d 740, 748 (9th Cir. 2003) (holding, in age discrimination case, that  
 2 without more, discriminatory motive could not be inferred from the fact that the plaintiff's  
 3 replacement was younger).

4           In addition, plaintiff challenges defendant's proffered reason on the ground that Bussby,  
 5 Thomson and Benavides were less qualified than plaintiff because they were mail handlers  
 6 without experience working in a Transportation and Networks Division ("Transportation")  
 7 when they were selected for supervisor of transportation positions. However, plaintiff cites no  
 8 admissible evidence in support of his assertion. In opposing summary judgment, plaintiff  
 9 cannot establish a genuine issue of material fact where the only evidence presented is  
 10 uncorroborated and self-serving testimony. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d  
 11 1054, 1061 (9th Cir. 2002). Here, even if plaintiff's assertions in brief could be considered  
 12 testimony, plaintiff lacks foundation to testify as to the work experience of others. Fed. R. of  
 13 Evid. 602; (*See also* Opp. Ex. H (Benavides Dep. 6:8-13) ( prior to receiving her supervisor of  
 14 transportation position, she served as an acting supervisor of transportation in San Francisco).  
 15

16           Plaintiff does not appear to suggest that Review Board ("Board") members were  
 17 motivated by applicants' race or national origin in creating a list of the most qualified  
 18 applicants for Inouye to interview for transportation supervisor vacancies. However, plaintiff  
 19 asserts that, contrary to Inouye's statements, he did not use Boards in 1999, 2000, or 2003 to  
 20 help determine the most qualified candidates. Plaintiff offers no evidentiary support for his  
 21 assertion other than the fact that he was not "allowed to be in any selection process or review  
 22 board," i.e., was not selected for interview with the Board, during those years.<sup>3</sup> (Opp. 3). In  
 23

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24           <sup>3</sup> Plaintiff cannot attribute inadequacies in his case to defendant. Contrary to plaintiff's  
 25 assertion, defendant did not refuse to provide plaintiff with information concerning Board members  
 26 who participated in the 1999, 2000, 2001, and 2002 selection process, the "results of the board  
 27 interview," and the applications for transportation supervisor vacancies from 1999 through 2002. (Opp.  
 28 3). In January 2008, defendant's counsel informed plaintiff that pursuant to the USPS's document  
 retention policy, documents related to the 1999 to 2002 transportation supervisor vacancies had been  
 destroyed before plaintiff filed his complaint. (See Supp. Declaration of Jennifer S Wang ("Supp. Wang  
 Decl.") ¶ 2, Ex. A; 2d Supp. Wang Decl. ¶¶ 2-9, Exs. A-D, Morris Decl. Decl. ¶ 2, Ex. A.). Defendant  
 produced the application information from 2003; no other responsive documents were located. (*Id.* ¶ 2;

1 fact, plaintiff's assertions are contradicted by the deposition testimony he attaches to his brief.  
 2 (See e.g., Opp. Ex. G (Taylor Dep.) 29:4-5) (stating that there was a Board in 2000).

3 Plaintiff also argues that defendant's proffered reasons are pretext for discrimination  
 4 because under Article 33 of the Agreement, plaintiff, as a member of the Motor Vehicle Craft,  
 5 should have received priority for available supervisor of transportation positions over Bussby,  
 6 Thomson and Benavides because they were mail handlers outside the craft. (Opp. 2). Contrary  
 7 to plaintiff's assertion, Article 33 of the Agreement does not apply to selection of supervisor of  
 8 transportation positions. Article 33 discusses "promotions to a craft position." But supervisory  
 9 personnel are not considered "craft" employees for the purposes of the Agreement. (See  
 10 Supplemental Declaration of Jennifer S Wang ("Wang Decl.") Ex. B (Agreement Excerpts) Art.  
 11 1.1, 1.2, 33; Opp. Ex. A (Inouye Dep.) 13:3-12). In fact, Article 1.2 of the Agreement explicitly  
 12 states that its provisions do not apply to supervisory personnel. (Wang Decl. Ex. B). Unlike  
 13 promotion to craft positions, selection for supervisory positions is based solely on the  
 14 applicants' qualification. (Opp. Ex. A (Inouye Dep.) 13:3-12).

15 Even if plaintiff could demonstrate that Keith Inouye, the selecting official for the  
 16 transportation supervisor vacancies at issue, violated the requirements of Article 33 in selecting  
 17 Bussby, Thomson, and Benavides, plaintiff provides no evidence that this suggests Inouye was  
 18 motived by discrimination in the selection of supervisors of transportation. Rather, plaintiff  
 19 acknowledges that Inouye "issued many disqualification letter to many Motor Craft acting  
 20 supervisor applicants." (See Opp. 3). Accordingly, plaintiff lacks substantial evidence of  
 21 discriminatory intent.

22

**B. Plaintiff's Discrimination Claim Based on Delayed Reassignment to Driving  
 Position Fails**

23 Plaintiff has not established a prima facie case of discrimination based on defendant's  
 24 denial of his request for reassignment to a driving position in 2002 and delay in reassigning  
 25 plaintiff in 2005.

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26  
 27  
 28 2d Suppl. Wang Decl. ¶¶2-9).

1                   **1. 2002 Request**

2                 First, failure to receive a requested reassignment does not constitute an adverse  
 3 employment action. An adverse employment action is one that materially affects the  
 4 compensation, terms, conditions, or privileges of the plaintiff's employment. *See Chuang v.*  
 5 *Univ. of Cal. Davis, Bd. of Trustees*, 225 F.3d 1115, 1126 (9th Cir.2000). Here, plaintiff cannot  
 6 identify any material detriment from not receiving a reassignment. Rather, plaintiff has a  
 7 personal preference for a driving position over a bulk mail assistant position. *See Ford v.*  
 8 *Sheriff-Coroner's Dep't of Contra Costa Cty*, No. C-97-3396 VWR, 1998 WL 898468, at \* 2-4  
 9 (N.D. Cal. Dec. 21, 1998) (plaintiff failed to show denial of transfer was adverse employment  
 10 action where she failed to "identify some factor other than [her] own personal preference or  
 11 [her] subjective feelings regarding each [position] in order to demonstrate an adverse action.");  
 12 *McGowan v. City of Eufala*, 472 F.3d 736 (10th Cir. 2006) (the defendant's failure to assign the  
 13 plaintiff to day shift not materially adverse where preference for shift was purely for personal  
 14 reasons and she was not permanently denied the shift); *Kortan v. State of California*, 5 F. Supp.  
 15 2d 843, 853-54 (9th Cir. 1998) (denial of transfer request not actionable).

16                 Plaintiff admits that at the time of his 2002 request for reassignment, he worked the  
 17 same schedule that he originally bid for in 1999, when he chose to became a bulk mail assistant.  
 18 ( Tam Dep. 35:2-18, 92:2-16, internal Ex. 4 ("Because of my personal reason that I want to be  
 19 reassign[ed] to be [a] tractor-trailer operator again"). Plaintiff states that by 2002, he had  
 20 decided that those hours made it difficult for him to keep a regular sleep pattern and fulfill his  
 21 childcare responsibilities. (Supp. Wang Decl. Ex. C (Tam Dep.) 89:19-91:12). Accordingly,  
 22 plaintiff preferred to return to a driving position because he could obtain a more convenient  
 23 shift as a driver; as a bulk mail assistant he had the lowest seniority, but, from his USPS driving  
 24 experience, plaintiff had "a lot of seniority" as a driver. (Tam Dep. 97:23-98:14).

25                 Second, even if plaintiff could establish that defendant's failure to reassign plaintiff in  
 26 2002 constitutes an adverse employment action, plaintiff has not identified any similarly  
 27 situated employee outside of his protected class who was treated more favorably. A "similarly  
 28

situated" employee is one whose job is similar to the plaintiff's "in all material respects," and who displayed conduct similar to the plaintiff's. *Moran v. Selig*, 447 F.3d 748, 756-57 (9th Cir. 2006); *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2004). The plaintiff's and his comparators' circumstances must have been nearly identical for his comparators to qualify as "similarly situated." *Moran*, 447 F.3d at 756.

In his opposition, plaintiff asserts, without any corroborating evidence, that three other bulk mail assistants Danny Clark, Norman Davis, and Debbie Nails received reassignment back to a full-time driving position. However, plaintiff fails to offer evidence showing that these comparators were similarly situated to plaintiff in "all material respects." Plaintiff asserts that these comparators were reassigned to driving positions without providing any information regarding the circumstances of the reassignment, or when these reassignments occurred. Moreover, plaintiff concedes that Nails is not similarly situated to plaintiff because, she requested transfer back to a driving position within 90 days. (Opp. 4). Plaintiff concedes that pursuant to Article 39 of the Agreement, employees voluntarily reassigned from one position to another may return to their former position within 90 days. (*Id.*).

Even if plaintiff had set forth a prima facie case of discrimination, he has failed to rebut defendant's legitimate, non-discriminatory reasons for failing to reassign plaintiff in 2002. Plaintiff did not receive his requested reassignment to a full-time tractor trailer operator in 2002 because no vacancies were available. *See Kortan*, 5 F. Supp.2d at 854 (lack of vacancy is legitimate reason to deny transfer). Plaintiff argues that the "sign-up sheet" for 2003 tractor trailer bid positions shows 12 "residual," or open positions after existing drivers had completed their annual bidding for positions. (Opp. Ex. A internal Ex. 23). However, the "sign-up sheet" plaintiff cites shows that each of these "residual" positions were abolished, not vacant. Plaintiff suggests, without support, that the positions were only abolished because they were unfilled by current drivers, and thus should have been offered to him; however the "sign-up sheet" plaintiff cites shows that even bids actually assigned to individual drivers were abolished.

Plaintiff also argues that a vacant driving position existed in 2002 because a driver, Mr. Reinosa, passed away in September 2002. Even if true, plaintiff fails to offer evidence

1 demonstrating that this vacancy should have been offered to him. Pursuant to the Agreement,  
2 defendant must give first priority for available full-time tractor trailer operator (“TTO”)  
3 positions to current drivers, *i.e.*, TTOs and part-time flexible motor vehicle operations  
4 (“MVOs”). It is undisputed that at the time of his request, plaintiff worked as a bulk mail  
5 assistant, not as a driver. Accordingly, plaintiff has failed to offer “substantial” and “specific”  
6 evidence that defendant’s reason for failing to reassign plaintiff in 2002 is pretextual.

7 **2. 2005 Request**

8 Plaintiff has failed to establish a prima facie case of discrimination based on the delay in  
9 his reassignment to a driving position in 2005. First, plaintiff cannot show that he suffered any  
10 adverse employment action. Even if denial of a request for reassignment to a driving position  
11 could be considered an adverse employment action, it is undisputed that plaintiff actually  
12 received the requested reassignment. (Opp. 5; Tam Dep. internal Ex. 8). Plaintiff requested  
13 reassignment in February 2005, and ultimately received his reassignment in September 2005.  
14 (Tam Dep. internal Exs. 5, 8). Plaintiff also appears to suggest that he suffered an adverse  
15 employment action because he received reassignment to a part-time, rather than full-time  
16 position. However, plaintiff does not dispute that in 2005, he requested reassignment to a part-  
17 time driving position. (Tam Dep. internal Ex. 5).

18 Even if the seven month delay between plaintiff’s February 2005 request and his  
19 September 2005 reassignment could be considered an adverse employment action, defendant  
20 has a legitimate, non-discriminatory reason for its delay. Plaintiff submitted a written request  
21 for reassignment to a part-time flexible motor vehicle operator in February 2005 to Balvindar  
22 Chadha, Manager of Postal Vehicle Service, and Inouye. However, plaintiff was informed that  
23 around October 15, 2003, the USPS had instituted a new website – eReassign, managed by  
24 Human Resources – to process requests for voluntary reassignments. (Declaration of Balvinder  
25 Chadha (“Chadha Decl.”) ¶ 8, Ex. D), and that consistent with the USPS’ new policy, plaintiff  
26 had to apply for his reassignment via the eReassign website. (*Id.* ¶ 8; Tam Dep. 118:11-16).  
27 Plaintiff submitted his application via the eReassign website around May 2005 (Tam Dep. Ex. 6  
28

1 (eReassign Application)), and obtained reassignment to a part-time flexible MVO position only  
 2 four months later, around September 17, 2005. (*Id.* 118:21-119:3; Ex. 8).

3 **C. Plaintiff's Claim of Discrimination Based on Failure to Change His 2005 Work  
 4 Schedule Fails**

5 Plaintiff cannot establish a prima facie case of discrimination based on defendant's  
 6 refusal to change his work schedule in February 2005.<sup>4</sup> Defendant's refusal does not constitute  
 7 an adverse employment action. As the bulk mail assistant with the lowest seniority, since 1999  
 8 plaintiff had received the relief position during bidding. (*Tam Dep.* 97:20-98:17). Plaintiff  
 9 cannot show that obtaining the same bid constitutes a material adverse change in the terms and  
 10 conditions of his employment. Also, plaintiff cannot identify any similarly situated individual  
 11 outside of his protected classes who received a requested work schedule change outside the  
 12 annual bidding process. (*Id.* 97:20-98:14, 171:7-22).

13 Even if plaintiff has established a prima facie case of discrimination, he has failed to  
 14 rebut defendant's legitimate, non-discriminatory reason for failing to change plaintiff's  
 15 schedule in February 2005, after completion of annual bidding. Each year, plaintiff's managers  
 16 developed a schedule of bulk mail assistants positions that would efficiently and effectively  
 17 carry out the operational needs of Transportation. (*Chadha Decl.* ¶¶ 3-4). Once the bulk mail  
 18 assistants obtained their positions for the year, changing one bid (*i.e.*, position) would affect the  
 19 other bids, and thus, upset the entire bulk mail assistant schedule and the operational goals for  
 20 which it was developed. In fact, plaintiff admits that once bidding is completed, his managers

21  
 22 <sup>4</sup> In his Opposition, plaintiff appears to raise new claims of discrimination based on his 2003 and  
 23 2004 schedules not previously alleged in his second amended complaint. A plaintiff is not allowed to  
 24 add new claims not included in the complaint through briefing on a motion for summary judgment.  
*Dolan v. United States*, No. 05-3062-CL, 2008 WL 362556, at \* 22 (D. Or. Feb. 8, 2002) (refusing to  
 25 consider the plaintiff's claims of retaliation based on her transfer to another district and delayed  
 26 placement because these claims were not included in her complaint) *citing Gilmour v. Gates, McDonald*  
 & Co., 382 F.3d 1312, 1315 (11th Cir. 2004). Accordingly, plaintiff's claims related to his 2003 and  
 2004 scheduled should not be considered.

27 Moreover, plaintiff admits that he resolved his complaints regarding his 2003 schedule as part of  
 28 an EEO settlement. By voluntarily entering into a settlement of her EEO claims, plaintiff is precluded  
 from reviving his underlying claims in a Title VII lawsuit. *See Kirby v. Dole*, 736 F.2d 661, 663-664  
 (11th Cir. 1984); *Sherman v. Standard Rate Data Serv., Inc.*, 709 F. Supp. 1433, 1437-38 (N.D. Ill.  
 1989). Plaintiff admits that he entered an EEO settlement to change his 2003 work schedule, and that the  
 work schedule developed during that settlement continued through 2004. (Opp. 4).

1 “cannot change [the schedule]. If they change it, they got to ruin the whole bid, because every-  
 2 year process.” (Tam Dep. 100:3–8).

3 **D. Plaintiff’s Discrimination Claim Based on Denial of Annual Leave Fails**

4 Plaintiff’s discrimination claim based on defendant’s denial of his January 27, 2005  
 5 request to take annual leave from February 9-11, 2005 fails. Plaintiff has not established a  
 6 prima facie case of discrimination. Here, plaintiff not only provided less than two-weeks’  
 7 notice of his leave, but also requested leave on those days in which he was the only bulk mail  
 8 assistant scheduled to work his shifts. Plaintiff has not identified another employee outside of  
 9 plaintiff’s class who was treated more favorably under similar circumstances. Moreover,  
 10 defendant proffered a legitimate, nondiscriminatory reason for denying plaintiff’s annual leave  
 11 request: plaintiff did not provide sufficient advance notice, and his absence would have  
 12 resulted in insufficient coverage of plaintiff’s shift. In his opposition, plaintiff cites no  
 13 evidence rebutting defendant’s legitimate, non-discriminatory reason.

14 **E. Plaintiff’s Claim of Discrimination Based on Failure to Call Plaintiff to Work  
 15 Overtime on February 12, 2005 Fails**

16 Plaintiff has not established a prima facie case of discrimination based on defendant’s  
 17 decision not to call plaintiff in to work overtime on February 12, 2005, plaintiff’s scheduled day  
 18 off. Denial of overtime opportunities is not an adverse employment action under Title VII.  
 19 *Garity v. Potter*, 2008 WL 872992, at \* 3 (D. Nev. Mar. 27, 2008). Plaintiff is not entitled to  
 20 work overtime hours. Accordingly, plaintiff has not alleged any action that affected plaintiff’s  
 21 the terms, conditions, or privileges of his employment. Moreover, plaintiff testified that he  
 22 knows of no similarly situated employee who was treated more favorably, *i.e.*, was called in on  
 23 a scheduled day off to work overtime on February 12, 2005. (Tam Dep. 186:12-15, 187:15-  
 24 188:2, 188:11-23).

25 Even if plaintiff could establish a prima facie case of discrimination, defendant has  
 26 legitimate, non-retaliatory reasons for not calling plaintiff for overtime on February 12, 2005.  
 27 February 12, 2005 was plaintiff’s scheduled day off. (*See* Chadha Decl. ¶ 7). The USPS does  
 28 not require supervisors to call in employees to report to work overtime on their scheduled days

1 off. (*Id.*). Chadha determined that he did not need an assistant to come in for eight hours of  
 2 work; rather, sufficient coverage for February 12, 2005 could be provided by calling in another  
 3 bulk mail assistant, William Jones, scheduled to work on February 12, 2005, to begin his shift  
 4 four hours early. (*Id.* ¶ 7). This decision reflected a business judgment to reduce costs by  
 5 incurring only four, rather than eight hours of overtime costs. (*Id.*; Supp. Wang Decl. Ex. B at  
 6 Art. 8.8(B) (employee will be guaranteed eight hours of work, or pay in lieu thereof, when  
 7 called in on the employee's scheduled day off).

8 Plaintiff argues that defendant's proffered reason is pretext for discrimination because  
 9 Chadha has, on unspecified occasions, threatened his supervisor, Lucius Paulk, with discipline  
 10 if he continued to call plaintiff in for overtime, and has settled an overtime related grievance  
 11 with Jones but not plaintiff. First, plaintiff cites no evidence in support of his assertion that  
 12 Chadha only restricted Paulk's use of plaintiff (rather than all bulk mail assistants) for overtime  
 13 on a scheduled days off, nor does plaintiff provide any information regarding the context in  
 14 which Paulk has attempted to unsuccessfully call plaintiff in to work overtime on his scheduled  
 15 days off. Rather, Chadha articulated a "no call in overtime policy" to restrict overtime use of  
 16 bulk mail assistants on their scheduled days off. Plaintiff admits that this overtime policy  
 17 applies to all the bulk mail assistants, not just plaintiff. (Tam Dep. Tr. 188:6-23). Contrary to  
 18 plaintiff's assertion, Chadha did not make an exception to his "no call in overtime policy" in  
 19 requesting that Jones begin his shift early on February 12, 2005. It is undisputed that plaintiff,  
 20 unlike Jones, was not scheduled to work on February 12, 2005.

21 Second, that Chadha settled an overtime related union grievance brought on Jones'  
 22 behalf, and did not settle an overtime related grievance brought on plaintiff's behalf does not  
 23 suggest any discriminatory intent. The grievances plaintiff cites do not relate to the overtime  
 24 request for February 12, 2005, and plaintiff offers description of the context in which the need  
 25 for overtime arose.

26 **F. Plaintiff's Claim of Discrimination Based on Intimidating Comments Fails**

1 Plaintiff cannot establish a prima facie case of discrimination based on his allegation  
 2 that Inouye approached him on September 23, 2004 and intimidated him by telling him that he  
 3 fought against the system. Verbal threats do not constitute adverse employment actions because  
 4 of their lack of consequence; they do not affect the terms or conditions of employment. *See*  
 5 *Helgeson v. Am. Int'l Group, Inc.*, 44 F. Supp. 2d 1091, 1098 (S.D. Cal. 1999).

6 **G. Plaintiff's Retaliation Claim Fails**

7 Summary judgment for defendant on plaintiff's retaliation claim is appropriate because  
 8 has not offered specific or substantial evidence to rebut defendant's legitimate, non-retaliatory  
 9 reasons for restructuring the 2005 bulk mail assistant schedule.<sup>5</sup> Proof of unlawful retaliation is  
 10 established using the same framework used to prove discrimination under Title VII. *Stegall v.*  
 11 *Citadel Broadcasting Co.*, 350 F.3d 1061, 1066 (9th Cir. 2003). Once the plaintiff makes out a  
 12 prima facie case of retaliation, the burden shifts to defendant to articulate a legitimate,  
 13 non-discriminatory reason for the adverse employment action. *Id.* If the defendant articulates  
 14 such a reason, the plaintiff bears the ultimate burden of demonstrating that the reason was  
 15 merely a pretext for a discriminatory motive. *Id.* The plaintiff must proffer "specific" and  
 16 "substantial" evidence of pretext to overcome a motion for summary judgment. *Id.*; *see Manatt*  
 17 *v. Bank of Am., N.A.*, 339 F.3d 792, 800-01 (9th Cir. 2003).

18 Defendant restructured the 2005 bulk mail assistant schedule to create more overlap in  
 19 the reporting hours for the three tours, with the intention of reducing the need to require an  
 20 assistant to work over his or her scheduled hours, and thus, reduce overtime costs. (Chadha  
 21 Decl. ¶ 5, Ex. A). As part of the restructuring, the reporting time and days for *all* of the bulk  
 22 mail assistant positions were changed, not just that of the relief assistant. (*Id.*). Plaintiff argues  
 23 defendant's reasons are pretextual because the 2005 schedule required him to work hours  
 24 outside the scope of his position. Plaintiff asserts that he did not hold a "relief" position, but  
 25 rather "tour 2 relief" position, *i.e.*, a position to relieve only tour 2 bulk mail assistants to allow  
 26 those clerks to take scheduled days off as well as breaks during their shifts. (Opp. 4, internal  
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28 <sup>5</sup> Here, it is unclear what protected activity plaintiff claims caused defendant's alleged retaliatory conduct.

1 Ex. D (Chadha Dep. Tr.) 35:4-36:2, 37:22:-24). Plaintiff suggests that as a tour 2 relief  
 2 assistant he only expected to work shifts beginning at 7:00 a.m. (Opp. 5). Plaintiff's 1999  
 3 schedule contradicts his argument; in 1999, when plaintiff first bid for a bulk mail position, the  
 4 relief position he obtained required that he start at 3:00 p.m. on Mondays and 10:00 a.m. on  
 5 Tuesdays. (Opp. 5). Moreover, plaintiff provides no evidence, other than his self-serving  
 6 statements, that the bulk mail assistant relief position must be limited to "tour 2 relief." Indeed,  
 7 the bulk mail assistant schedules simply list a single "relief" position. (See Opp. Ex. B internal  
 8 Ex. 1). Chadha explained, and plaintiff does not dispute, that there is only one relief position,  
 9 not three relief positions, e.g., one for each of the three tours (or shifts). (Opp. Ex. D (Chadha  
 10 Dep. Tr.) 14:11-17). Because there is only one relief position, the relief assistant, depending on  
 11 the office's workload and operational needs, may be scheduled to cover more than one tour.  
 12 (*Id.* 15:12-24).

13 Also, plaintiff disputes defendant's proffered reasons for the 2005 schedule on the  
 14 ground that his Wednesday schedule served no business purpose because it required him to  
 15 begin work at 7:00 p.m., when two other clerks were still on duty. Plaintiff provides no  
 16 evidence supporting his assertion that this schedule was cost ineffective. (Opp. 4). Rather, the  
 17 2005 schedule shows that plaintiff's Wednesday hours served to relieve two tour 2 clerks,  
 18 permitting those clerks to take meal and other necessary breaks. (See Opp. 4, Ex. B (Orozco  
 19 Dep. Tr.) internal Ex. 1 at 4, Ex. D (Chadha Dep. Tr.) 34:12-16, 37:11-24). Moreover, the  
 20 Wednesday schedule plaintiff complains of is consistent with defendant's articulated purpose in  
 21 restructuring the 2005 bulk mail assistant schedule: to create more overlap in the reporting  
 22 hours for the positions in order to reduce the need to require an assistant to work over his or her  
 23 scheduled hours.

24 Plaintiff argues that the defendant's reasons are pretext for retaliation because the 2005  
 25 schedule defendant created violates the Agreement. Plaintiff asserts, without further  
 26 explanation, that the 2005 schedule violates Articles 1.6, 8, 14, and 34(A), (B) and (C) of the  
 27 Agreement. Article 1.6 states that "[s]upervisors are prohibited from performing bargaining-  
 28 unit work." (Supp. Wang Decl. Ex. B). Given that plaintiff complains that too many bulk mail

assistants were scheduled to work the same shifts, it is unclear how supervisors would be forced to perform bargaining unit work as a result of the 2005 schedule. Article 8 states, among other things, that “[a]s far as practicable the five days of an employees work week shall be consecutive days within the service week.” (*Id.* at 8.2(C)). Accordingly, that the 2005 schedule required non-consecutive days off for several of the positions, including that of the relief position, does not suggest violation of Article 8. Article 14 requires “management to provide safe working conditions.” Nothing in the 2005 schedule suggests that defendant required bulk mail assistants to work in unsafe conditions. Article 34(A) recognizes the principle of “a fair day’s work for a fair day’s pay;” Article 34(B) requires the USPS to provide a “fair, reasonable and equitable” work measurement systems and time or work standards; Article 34(C) states that before changing any work measurement systems or time or work standards, management will notify the union in advance. (*Id.*). Plaintiff does not assert that, under the 2005 schedule, bulk mail assistants were not properly paid, required to work under different productivity standards. Accordingly, plaintiff has failed to meet his burden of establishing substantial evidence of retaliatory intent.

#### **H. Plaintiff Cannot Establish a Hostile Work Environment/Harassment Claim**

Plaintiff has not identified any evidence of a genuine, material, triable issue of fact related to his claim for hostile work environment. In fact, he has offered no discussion of his harassment claim in his Opposition. To establish a claim of hostile work environment harassment, plaintiff must provide that harassment in his workplace is sufficiently severe or pervasive as to alter the terms or conditions of employment and create an abusive work environment. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). Also, plaintiff must establish a causal nexus between the harassment and plaintiff’s protected characteristics. *See Palesch v. Missouri Comm’n on Human Rights*, 233 F.3d 560, 566 (8th Cir. 2000).

Defendant has shown that harassment plaintiff alleges does not rise to a hostile work environment as a matter of law. Plaintiff bases his harassment claim on seven alleged events that took place over a span of three years, from 2004 to 2007. None of these incidents plaintiff complains of amount to an objectively hostile work environment: plaintiff does not complain

of any profanity; crude behavior, or conduct causing him any humiliation. Even if true, these isolated incidents, occurring across a three year span, do not rise to the level of unlawful harassment. *See Farragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). Also, plaintiff has offered nothing more than speculation and conjecture of defendant's discriminatory intent. *See Palesch*, 233 F.3d at 567-68 (to meet his burden to defeat summary judgment, plaintiff must offer "more than speculation and conjecture to make the required connection from the mistreatment she alleges to gender or race-based animus"). Accordingly, plaintiff's claim fails.

### **I. Plaintiff Cannot Bring Claim for Violations of the Agreement**

Plaintiff cannot assert a claim for violation of the Agreement between the APWU and USPS. A USPS employee subject to a collective bargaining agreement containing a binding procedure for resolving grievances cannot maintain a cause of action unless the union failed to provide him fair representation. *See Bowen v. United States Postal Serv.*, 459 U.S. 212, 220-22 (1983); *Johnson v. United States Postal Serv.*, 756 F.2d 1461, 1467 (9th Cir. 1985). Even if plaintiff's claim could be construed as a one for inadequate representation, he can provide no evidence for that claim because he did not file grievances for the violations he now alleges.<sup>6</sup> (Tam Dep. 222:17-223:17). *See Stupy v. United States Postal Serv.*, 951 F.2d 1079, 1082 (9th Cir. 1991) ("To establish that the union breached its duty of fair representation, the employee must *attempt* use of the contract grievance procedure.") (emphasis added).

### **III. CONCLUSION**

For the reasons stated above, defendant respectfully requests that the Court grant summary judgment in his favor.

Respectfully submitted,

JOSEPH P. RUSSONIELLO  
United States Attorney  
/s/

Dated: June 20, 2008

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JENNIFER S WANG  
Assistant United States Attorney

<sup>6</sup> Although plaintiff states that he did not receive a copy of the Agreement until 2006, he does not suggest that the APWU improperly withheld the Agreement, nor does he suggest that he was not aware of grievance procedures until 2006. In fact, plaintiff cites to a grievance he filed in 2004, prior to his receipt of a copy of the Agreement. (Opp. Ex. D, Ex. 5).